

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

RICHARD ENGLISH,

Plaintiff and Appellant,

v.

MERCURY INSURANCE COMPANY et
al.,

Defendants and Respondents.

D072259

(Super. Ct. No. 37-2016-00027043-
CU-PA-NC)

APPEAL from a judgment and orders of the Superior Court of San Diego County,
Earl H. Maas III, Judge. Affirmed as to the judgment and one order; dismissed as to
appeal from other orders.

Richard English, in pro. per., for Plaintiff and Appellant.

O'Connor, Schmeltzer & O'Connor and Lee P. O'Connor for Defendant and
Respondent Mercury Insurance Company.

Gates, O'Doherty, Gonter & Guy and Thomas A. Scutti for Defendants and
Respondents Justin R. Stockton and Tracia Valeski.

I.

INTRODUCTION

Plaintiff Richard English, proceeding in propria persona, appeals from a judgment entered in favor of defendant Mercury Insurance Company (Mercury), as well as from orders of the trial court granting multiple motions made by defendants Justin Stockton and Tracia Valeski.

English, who represented himself in the trial court as well, filed a complaint against the three defendants alleging multiple causes of action arising out of a vehicle collision caused by Stockton while Stockton was driving a vehicle belonging to his wife, Valeski. English complained not only about Stockton's conduct in causing the accident, but also about the alleged conduct of the defendants in the aftermath of the collision, including conduct that took place during criminal proceedings brought against Stockton. Unhappy with the restitution amount that he was to receive as a result of the criminal proceedings against Stockton and dissatisfied with the settlement offer made by Stockton's insurer, Mercury, English sought monetary damages from Stockton and Valeski, as well as from Mercury, pursuant to numerous causes of action. In addition to alleging that Mercury had mishandled English's claims against Stockton and Valeski, English asserted that Mercury conspired with Stockton's criminal defense attorney to have the attorney publish, during the course of the criminal proceeding against Stockton, English's private medical information that portrayed English in a negative light.

In response to English's complaint, Mercury, Stockton and Valeski each filed multiple motions. Mercury filed a motion pursuant to Code of Civil Procedure section

425.16,¹ the anti-SLAPP (strategic lawsuits against public participation) statute,² as to two causes of action, and demurred to the remainder of the complaint. Stockton also filed an anti-SLAPP motion pertaining to the same two causes of action that Mercury had challenged, a demurrer, and a motion to strike portions of the complaint. Valeski filed a demurrer and a motion to strike portions of the complaint.

The trial court granted all of the defendants' motions and sustained their demurrers. With respect to defendant Mercury, the court granted its anti-SLAPP motion, and sustained its demurrer without leave to amend. The court thereafter entered judgment in favor of Mercury. With respect to defendant Stockton, the court granted his anti-SLAPP motion, as well as Stockton's motion to strike certain material from the complaint. The court also sustained Stockton's demurrer, but granted English leave to amend with respect to multiple causes of action. No judgment has been entered on the complaint as to Stockton. With respect to Valeski, the trial court granted her motion to strike certain portions of the complaint without leave to amend, and sustained her demurrer, but granted English leave to amend with respect to multiple causes of action. No judgment has been entered as to Valeski.

It is difficult to discern from English's briefing on appeal the precise ways in which he believes the trial court erred. It appears, however, that, at least in part, English

¹ Further statutory references are to the Code of Civil Procedure.

² We will refer to a motion filed pursuant to section 425.16 as an "anti-SLAPP motion."

may be attempting to obtain review of certain rulings of the trial court that are not appealable. To the extent that he is attempting to do so, we do not consider those issues and dismiss the appeal as to those rulings. To the extent that English is seeking review of the appealable judgment entered in favor of defendant Mercury, as well as the appealable order of the trial court granting defendant Stockton's anti-SLAPP motion with respect to two of the causes of action in the operative pleading, we consider the propriety of the trial court's rulings on the merits and affirm.³

II.

BACKGROUND

The operative complaint at the time of judgment is identified in the clerk's transcript as the "Amended Complaint," although the title page of the document states simply, "Complaint."⁴ The 28-page first amended complaint includes often dramatic language and attempts to set forth a variety of different causes of action; it is at times difficult to understand. The first amended complaint purports to set forth nine causes of

³ In addition, English's request for judicial notice, which was included in a filing titled "Motion to Augment" that was filed on January 18, 2018, is denied. The request is procedurally deficient given that English fails to explain why he contends the files and/or documents are judicially noticeable and relevant to the present appeal. (See Cal. Rules of Court, rule 8.252(a).)

⁴ The three respondents, Valeski, Stockton, and Mercury, agree that the pleading at issue was the *first* amended complaint. It appears that English filed two first amended complaints on September 12, 2016, approximately 13 minutes apart. The earlier-filed version was not signed, while the later-filed version was signed. The trial court indicates in its order that the operative pleading was the later-filed first amended complaint, which English filed at 12:34 p.m., and not the unsigned first amended complaint that English filed at 12:21 p.m.

action, titled: (1) "Invasion of Privacy"; (2) "Breach of Duty to Settle Accident Involving Gross-Negligence"; (3) "Negligent Entrustment of Motor Vehicle"; (4) "Bad Faith, Lies and Deceit in the Furtherance of Principal Mercury's Conspiracy to Avoid Gross-Negligence Liability"; (5) "Defamation per se"; (6) Intentional Interference with Prospective Economic Relations"; (7) "Breach of Implied Covenant of Good Faith and Fair Dealing"; (8) "Negligent Misrepresentation against Mercury Insurance Adjusters"; and (9) "Emotional Distress."⁵ (Italics and boldface omitted.) None of the causes of action specify to which defendant or defendants a particular cause of action is directed.

Of the many facts and assertions alleged in the first amended complaint, we can ascertain the following: English alleges that on September 13, 2014, while driving under the influence of alcohol, Stockton backed a vehicle owned by Valeski into English's parked vehicle while English was in his vehicle, and in doing so, caused property damage to English's car and caused English to suffer physical injuries. English further alleges that Mercury insured the vehicle that Stockton was driving at the time of the incident. Among additional allegations concerning the conduct of the various parties after the original incident, English alleges that during the restitution hearing portion of Stockton's

⁵ Although the body of the first amended complaint contains nine ostensible causes of action, there are 10 causes of action listed on the title page of the first amended complaint. In fact, the list on the title page of the first amended complaint appears to demonstrate that the complaint contains 11 causes of action. However, this is because the list omits a fifth cause of action, skipping from the fourth cause of action to the sixth cause of action.

The 10th cause of action that is listed on the title page, but is not found in the body of the first amended complaint, is labeled on the title page as "Interference with Civil Rights, 42 U.S.C.A. §§ 1981, 1983."

criminal proceeding, Stockton's criminal defense attorney published a defamatory statement that placed English in a false light. Specifically, English complains that the criminal defense attorney said, " 'Mr. English is the model of drug seeking behavior and there is no causal connection between the accident and his expenses Therefore, Mr. Stockton requests that Mr. English['s] restitution claims be denied.' " (Italics and boldface omitted.) English alleges that the criminal defense attorney was acting as Mercury's agent at the time he published the complained-of statement, and that Mercury and its employees illegally accessed English's medical records and conspired to have those records used "to oppose plaintiff's medical and property damage claims" (italics and boldface omitted) in the criminal case by causing the information to be published by the criminal defense attorney.

In response to English's first amended complaint, on October 31, 2016, Valeski filed a demurrer and a motion to strike portions of the complaint. Valeski's motion to strike targeted specific paragraphs in the first amended complaint that she asserted contained improper allegations, and also sought to strike English's request for exemplary or punitive damages as to Valeski. In her demurrer, Valeski argued that the first amended complaint was uncertain in its entirety, that the first cause of action for invasion of privacy, the fourth cause of action for " 'bad faith, lies, and deceit,' " and the ninth cause of action for emotional distress, all failed to state sufficient facts as to Valeski.

A few weeks later, on November 16, 2016, Stockton demurred to the first amended complaint. Stockton asserted that the operative pleading was uncertain in its entirety, that the first cause of action for invasion of privacy, the fourth cause of action

for " 'bad faith, lies, and deceit,' " the fifth cause of action for defamation, the sixth cause of action for intentional interference with prospective economic relations, and the ninth cause of action for emotional distress all failed to state sufficient facts to support a cause of action. Stockton also filed a motion to strike 53 specific portions of the first amended complaint that Stockton contended contained irrelevant, inflammatory material. Finally, Stockton filed an anti-SLAPP motion with respect to the causes of action for invasion of privacy and defamation, contending that the allegations of these two causes of action arose from protected activity, i.e., Stockton's defense in a criminal court proceeding, and that such activity was also covered by the litigation privilege.⁶

On December 8, 2016, Mercury filed an anti-SLAPP motion to strike from the first amended complaint the first cause of action for invasion of privacy, and the fifth cause of action for defamation. In relation to this motion, Mercury sought judicial notice of documents filed in the criminal action brought against Stockton. On the same day, Mercury also filed a demurrer to the first amended complaint.

In response to the demurrers and motions filed by the defendants, English filed multiple pleadings. Many of the documents were mislabeled, untimely, and essentially incomprehensible. Among the documents that English filed was one titled "Motion to Strike Mercury's Demurrer and Motion to Strike (SLAPP)." The trial court construed

⁶ In support of his demurrer and anti-SLAPP motion, Stockton sought judicial notice of the criminal proceeding against him.

English's "[M]otion to [S]trike" as a timely filed opposition to Mercury's demurrer and its motion to strike.

After briefing and a hearing, the trial court issued an order addressing all three defendants' pending demurrers and motions. With respect to Valeski, the trial court sustained her general demurrer on the ground of uncertainty, but granted English leave to amend. However, the court sustained Valeski's general demurrer to the causes of action for invasion of privacy (first cause of action), " 'bad faith, lies, and deceit' " (fourth cause of action), and emotional distress (ninth cause of action), without leave to amend. The court also granted Valeski's motion to strike the punitive damages request, without leave to amend; the court's denial of leave to amend with respect to the punitive damages request was based on its sustaining of the demurrer to the first cause of action without leave to amend.

With respect to Stockton, the trial court granted his anti-SLAPP motion, which was directed at the first (invasion of privacy) and fifth (defamation) causes of action, thereby striking those causes of action from the complaint.⁷

The trial court also sustained Stockton's special demurrer to the first amended complaint on the ground of uncertainty and granted English leave to amend. The court noted that the first amended complaint was uncertain with respect to which theories were pled against which defendant or defendants. The court also sustained Stockton's general

⁷ The court also awarded Stockton \$1,710.00 in attorney fees pursuant to Code of Civil Procedure section 425.16, subdivision (c) with respect to his meritorious anti-SLAPP motion.

demurrer to the fourth, sixth, and ninth causes of action. As to the fourth cause of action for " 'bad faith, lies, and deceit,' " and the sixth cause of action for intentional interference with prospective economic relations, the trial court sustained Stockton's general demurrers without leave to amend. However, the court sustained Stockton's general demurrer to the ninth cause of action for emotional distress with leave to amend.

In addition, the trial court granted Stockton's motion to strike various portions of the first amended complaint. With respect to the items that the court deemed improper to include in the pleading, the court did not permit English to amend. With respect to Stockton's motion to strike the punitive damages request, however, the trial court granted the motion to strike, but also granted English leave to amend to attempt to plead facts establishing the existence of fraud, malice, or oppression.

With respect to Mercury, the trial court granted its anti-SLAPP motion, which was directed at the first (invasion of privacy) and fifth (defamation) causes of action. The trial court sustained Mercury's general demurrer to the remainder of the first amended complaint, without leave to amend.⁸

A judgment of dismissal was entered as to Mercury on April 26, 2017.

English filed a timely notice of appeal, indicating that he was seeking to appeal a "Judgment of dismissal after an order sustaining a demurrer," but also indicating through handwritten notes on the notice of appeal that he was seeking review of orders or

⁸ In an abundance of caution, the trial court also denied English's "Motion to Strike," even though the court had construed the document as constituting an opposition to Mercury's pending motions.

judgments entered on "4-4, 2017 [¶] 4-3, 2017 x3 (As Amended) [¶] [and] 4-26, 2017."9

III.

DISCUSSION

English's lengthy opening brief is, like the operative pleading at issue here, often difficult to understand. Although English makes reference to a number of legal theories, case authorities, and alleged facts, some or all of which could potentially be relevant to the issues at hand, this court has had difficulty discerning the nature of English's claims of trial court error. We will address what we understand to be English's claims on appeal.

A. English's challenge to the judgment entered in favor of Mercury is without merit

The trial court entered judgment in favor of Mercury after granting Mercury's special motion to strike the first (invasion of privacy) and fifth (defamation) causes of action, and sustaining Mercury's demurrer to the remaining causes of action without leave to amend. Because the court entered a judgment of dismissal as to Mercury, English may appeal from that judgment and seek review of the trial court's rulings, even though the court did not enter judgment with respect to the other named defendants. (See *Ram v. OneWest Bank, FSB* (2015) 234 Cal.App.4th 1, 9 [the one final judgment rule generally requires all claims to be resolved prior to appeal, but this rule does not apply " ' "when

⁹ The trial court issued its minute orders with respect to Stockton, Valeski, and Mercury on April 3, and entered a judgment in favor of Mercury on April 26, 2016. The record is unclear as to why the court appears to have issued virtually identical minute orders on April 3, 2016 and April 4, 2016, and the parties have not addressed this.

the case involves multiple parties and a judgment is entered which leaves no issue to be determined as to one party. [Citations.]" ' ''].) We therefore consider the propriety of the trial court's rulings with respect to Mercury's anti-SLAPP motion and its demurrer.

1. *The trial court did not err in granting Mercury's anti-SLAPP motion*

In his first amended complaint, English alleged that Stockton's criminal defense attorney filed an opposition to English's request for restitution in the criminal proceeding against Stockton, and that in opposing English's request for restitution, Stockton's attorney stated, "Mr. English fits the model of drug seeking behavior and there is no [causal] connection between the accident and his expenses. . . . Therefore, Mr. Stockton requests that Mr. English's restitution claims be denied." In the first cause of action for invasion of privacy, English alleged that the statement that the criminal defense attorney made in court violated English's right to privacy, and that the criminal defense attorney was acting as an agent of Mercury. Similarly, in the fifth cause of action, English alleged that the criminal defense attorney's statement defamed English, and that the attorney was acting as Mercury's agent at the time he made the allegedly defamatory statement.

The anti-SLAPP statute is intended to address meritless lawsuits that are intended to "chill" the exercise of the constitutional right of free speech. (§ 425.16, subd. (a).) Section 425.16, subdivision (b)(1) states: "A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that

the plaintiff has established that there is a probability that the plaintiff will prevail on the claim."

A trial court ruling on an anti-SLAPP motion engages in a two-step process. (*Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 67 (*Equilon Enterprises*).) At the first step, the court must determine whether the moving defendant has made a threshold showing that the challenged cause or causes of action arise from protected activity, that is, activity by defendants in furtherance of their constitutional right of petition or free speech. (*Ibid.*) Protected acts include: (1) written or oral statements made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law; (2) written or oral statements made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law; (3) written or oral statements made in a place open to the public or in a public forum in connection with an issue of public interest; or (4) any other conduct in furtherance of the exercise of the constitutional rights of petition or free speech in connection with a public issue or an issue of public interest. (§ 425.16, subd. (e).) If at this step the court determines that the challenged cause or causes of action do not arise from protected activity, the motion is denied and the court need not proceed to the second step.

If, however, the trial court concludes that the defendant has met its initial burden, the court must proceed to the second step and determine whether the plaintiff has demonstrated a probability of prevailing on its claim. (*Equilon Enterprises, supra*, 29 Cal.4th at p. 67.) To satisfy this burden, "the plaintiff 'must demonstrate that the

complaint is both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited.' [Citations.] In deciding the question of potential merit, the trial court considers the pleadings and evidentiary submissions of both the plaintiff and the defendant (§ 425.16, subd. (b)(2)); though the court does not weigh the credibility or comparative probative strength of competing evidence, it should grant the motion if, as a matter of law, the defendant's evidence supporting the motion defeats the plaintiff's attempt to establish evidentiary support for the claim." (*Wilson v. Parker, Covert & Chidester* (2002) 28 Cal.4th 811, 821.)

On appeal, we review an anti-SLAPP ruling de novo to determine whether the parties have met their respective burdens. (*Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260, 269, fn. 3.)

We now turn to the first step of the anti-SLAPP motion analysis and consider whether Mercury met its burden of showing that the first and fifth causes of action arose from protected activity. "In assessing whether a cause of action arises from protected activity, 'we disregard the labeling of the claim [citation] and instead 'examine the principal thrust or gravamen of a plaintiff's cause of action . . .['] We assess the principal thrust by identifying '[t]he allegedly wrongful and injury-producing conduct . . . that provides the foundation for the claim.' [Citation.] If the core injury-producing conduct upon which the plaintiff's claim is premised does not rest on protected speech or petitioning activity, collateral or incidental allusions to protected activity will not trigger application of the anti-SLAPP statute. [Citation.]" [Citation.]" [Citation.] '[T]he critical

point is whether the plaintiff's cause of action itself was based on an act in furtherance of the defendant's right of petition or free speech.' [Citation.] [¶] When evaluating whether the defendant has carried its burden under the first prong of the anti-SLAPP statute, 'courts must be careful to distinguish allegations of conduct on which liability is to be based from allegations of motives for such conduct. . . . [Citation.]' [Citation.] ' "The court reviews the parties' pleadings, declarations and other supporting documents to determine what conduct is actually being challenged, not to determine whether the conduct is actionable." ' " (*Hunter v. CBS Broadcasting Inc.* (2013) 221 Cal.App.4th 1510, 1520, italics omitted.)

A review of English's first amended complaint reveals that the first and fifth causes of action that were the subject of Mercury's anti-SLAPP motion are based on essentially the same alleged injury-producing conduct, namely the *publication* of English's purportedly private medical information by Stockton's criminal defense attorney to the court and general public. The first question that we must address is whether this conduct constitutes protected activity under the anti-SLAPP statute. We look to section 425.16, subdivision (e), which defines protected activity to include written or oral statements that are made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law. By definition, a statement made in a criminal proceeding is made "before a . . . judicial proceeding" (*id.*, subd. (e)(1)). English's defamation cause of action arises out of Stockton's criminal defense attorney's conduct in making the complained-of statement about English to the court. English asserts that in making the statement, Stockton and his attorney defamed English.

Because that conduct occurred in the context of an ongoing criminal proceeding, it is clearly protected conduct under the anti-SLAPP statute.

Further, when we examine English's invasion of privacy cause of action, it is clear that this claim, too, arises out of Stockton's criminal defense attorney's conduct in *publishing* the complained-of statement. Specifically, English asserts in his invasion of privacy cause of action that "the Parties and Participants at the direction of Principal Mercury and Does 1 through 10, did publicize plaintiff's private HIPPA protected medical data." (Italics omitted.) He elsewhere contends that Mercury, through Stockton's criminal defense attorney, published his private medical data, thereby "creat[ing] a false light in the public record, for all the world to see, which is highly offensive to Plaintiff and is intended, with malice, to be offensive." (Italics and boldface omitted.) It thus appears that English was attempting to assert an invasion of privacy claim under either a false light theory or a public disclosure of private facts theory.¹⁰ "False light is a species of invasion of privacy, based on publicity that places a plaintiff before the public in a false light that would be highly offensive to a reasonable person, and where the defendant knew or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the plaintiff would be placed." (*Price v. Operating Engineers Local Union No. 3* (2011) 195 Cal.App.4th 962, 970.) The

¹⁰ False light and public disclosure of private facts are two of four possible types of invasion of privacy claims recognized by California courts: "(1) intrusion upon one's physical solitude or seclusion; (2) public disclosure of private facts; (3) false light in the public eye; and (4) appropriation." (*Forsher v. Bugliosi* (1980) 26 Cal.3d 792, 808.)

elements of a cause of action for invasion of privacy based on the public disclosure of private facts are as follows: " '(1) public disclosure (2) of a private fact (3) which would be offensive and objectionable to the reasonable person and (4) which is not of legitimate public concern.' " (*Shulman v. Group W Productions, Inc.* (1998) 18 Cal.4th 200, 214.)

Regardless of which of these two theories of invasion of privacy English was attempting to assert, the conduct required to make out either claim would fall within the "protected conduct" identified in section 425.16, subdivision (e) because it is defense counsel's communicative conduct in publishing the allegedly private, negative medical information to the court that forms the basis of English's invasion of privacy cause of action.¹¹ Again, as with the defamation cause of action, the complained-of statement

¹¹ English includes some language in his briefing on appeal that one could interpret as suggesting that his invasion of privacy claim could have been premised on noncommunicative conduct—i.e., the alleged "reading" of his e-mails and purported accessing of his private medical information. (See *Kimmel v. Goland* (1990) 51 Cal.3d 202, 205 [there can be a "distinction between injury allegedly arising from communicative acts, i.e., the attorney's testimony, and injury resulting from noncommunicative conduct, i.e., the invasion of privacy resulting from the attorney's eavesdropping" and such a "distinction has traditionally served as a threshold issue in determining the applicability of (the litigation privilege set forth in the Civil Code)"].) However, as we have already explained, English's invasion of privacy claim relies on the *communicative* aspect of the defendants' purported conduct as the conduct that caused English's injury—i.e., Stockton's criminal defense attorney's publication to the court of English's purportedly private medical information.

Even if it would have been possible for English to have included a claim for invasion of privacy based on a noncommunicative theory of the cause of action, since he did not do so here, he is foreclosed from attempting to do so in response to the defendants' anti-SLAPP motions. Cases have made clear that a defendant has no right to amend a complaint to cure a deficient claim in the face of an anti-SLAPP motion: "A plaintiff cannot avoid [an anti-]SLAPP motion by amending the complaint." (*Hansen v. Department of Corrections & Rehabilitation* (2008) 171 Cal.App.4th 1537, 1547; accord, *Contreras v. Dowling* (2016) 5 Cal.App.5th 394, 411 [" '[a] plaintiff . . . may not seek to

made by Stockton's criminal defense attorney is a statement that was "made before a . . . judicial proceeding" and therefore epitomizes the protected activity defined in section 425.16, subdivision (e).

Given that English's first and fifth causes of action arise from protected activity, we move on to the second prong of the anti-SLAPP motion analysis. As to the second prong, we conclude, as the trial court did, that English failed to demonstrate a probability of prevailing on the merits of his causes of action for invasion of privacy and defamation. Specifically, the alleged injury-producing conduct involved a criminal defense attorney's statement, made in the context of an ongoing judicial proceeding, which is privileged pursuant to Civil Code section 47, subdivision (b). That provision of the Civil Code provides: "A privileged publication or broadcast is one made [¶] . . . [¶] (b) In any . . . (2) judicial proceeding"

"The usual formulation is that the [litigation] privilege applies to any communication (1) made in judicial or quasi-judicial proceedings; (2) by litigants or other participants authorized by law; (3) to achieve the objects of the litigation; and (4) that have some connection or logical relation to the action." (*Silberg v. Anderson* (1990) 50 Cal.3d 205, 212.) "The purposes of section 47, subdivision (b), are to afford litigants and witnesses free access to the courts without fear of being harassed subsequently by

subvert or avoid a ruling on an anti-SLAPP motion by amending the challenged complaint . . . in response to the motion'"]; *Sylmar Air Conditioning v. Pueblo Contracting Services, Inc.* (2004) 122 Cal.App.4th 1049, 1055; *Simmons v. Allstate Ins. Co.* (2001) 92 Cal.App.4th 1068, 1073 [§ 425.16 makes no provision for amending the complaint; "we reject the notion that such a right should be implied"].)

derivative tort actions, to encourage open channels of communication and zealous advocacy, to promote complete and truthful testimony, to give finality to judgments, and to avoid unending litigation." (*Rusheen v. Cohen* (2006) 37 Cal.4th 1048, 1063.)

Another purpose is to "promote[] effective judicial proceedings" by encouraging full communication with the courts. (*Flatley v. Mauro* (2006) 39 Cal.4th 299, 322.) To further these purposes, the privilege has been broadly applied. It is absolute and applies regardless of malice. (*Rusheen*, at p. 1063.)

The statement about which English complains—Stockton's criminal defense attorney's statements that "Mr. English fits the model of drug seeking behavior and there is no causal connection between the accident and his expenses. . . . Therefore, Mr. Stockton requests that Mr. English's restitution claims be denied"—was made to a judge during an ongoing criminal proceeding. It is clear that the litigation privilege applies to a statement such as this. As a result, English did not and cannot show a probability of prevailing on either his first or fifth causes of action.

2. *The trial court did not err in sustaining Mercury's demurrer without leave to amend*

With respect to the causes of action other than the first and fifth, Mercury filed a demurrer asserting that Mercury is not a proper party to the litigation. In order to address this contention, we review the remaining causes of action.

The second cause of action asserts a claim for breach of duty to settle accident involving gross negligence. As to Mercury, it is, effectively, a third party cause of action for bad faith, alleging that Mercury failed to settle English's action against Stockton and

Valeski despite liability being clear. The fourth cause of action, for "bad faith, lies and deceit," in which English alleges that Mercury was involved in a conspiracy to avoid "gross-negligence liability," the sixth cause of action, "intentional interference with prospective economic relations" (some capitalization omitted), the seventh cause of action, identified as a claim for breach of the implied covenant of good faith and fair dealing, the eighth cause of action, titled "negligent misrepresentation against Mercury adjustors" (some capitalization omitted), and the ninth cause of action, titled "emotional distress" (some capitalization omitted), all appear to be bad faith claims against Mercury. None of these claims may be brought against Mercury in an action asserted against Mercury's insureds, Stockton and Valeski.

Specifically, a third-party claimant such as English may not file a direct action against an insurer until *after* that third-party claimant has obtained a civil judgment against the insured in "an action based upon bodily injury, death, or property damage." (Ins. Code, § 11580, subd. (b)(2) [insurance policies covering loss of or damage to property caused by, among other things, any vehicle must include "[a] provision that whenever judgment is secured against the insured or the executor or administrator of a deceased insured in an action based upon bodily injury, death, or property damage, then an action may be brought against the insurer on the policy and subject to its terms and limitations, by such judgment creditor to recover on the judgment"].) Thus, pursuant to Insurance Code section 11580, subdivision (b)(2), "an injured party is compelled to bring two lawsuits if he seeks to collect a judgment from the insurer which issued a liability policy." (*Billington v. Interinsurance Exchange of Southern California* (1962) 71 Cal.2d

728, 744-745.) The first lawsuit is a civil action pursued by the third-party claimant against the insured—in this case, Valeski and Stockton—and the second lawsuit may be brought against the insurer. (See *Wright v. Fireman's Fund Ins. Companies* (1992) 11 Cal.App.4th 998, 1015 ["Under section 11580 the judgment against the insured is clearly an essential element of the claimant's right to recover against the insurer."].) Thus, "[t]o *sue an insurer directly*, a party must have obtained a final judgment against the insured." (*Id.* at p. 1016, italics added.) At this point, English has not obtained a judgment against Valeski or Stockton in a civil action based on bodily injury, death, or property damage.¹²

Further, to permit English to maintain a joint lawsuit against both Stockton and Valeski for various acts of negligence, and also against Mercury for bad faith, would violate the terms of Evidence Code section 1155. That section provides that evidence that an alleged tortfeasor is insured is inadmissible to prove the insured's negligence or wrongdoing. The purpose of the statute is to prevent the prejudicial use of such evidence in a proceeding to determine the insured's liability. (*Moradi-Shalal v. Fireman's Fund Ins. Companies* (1988) 46 Cal.3d 287, 306.) A joint lawsuit would obviously indicate to

¹² To the extent that English suggests that the restitution order imposed by the trial court in Stockton's criminal case is a "judgment" sufficient to meet the requirements of Insurance Code section 11580, subdivision (b)(2), we note that a criminal case, which is pursued by the People against a defendant, is not an action by a third-party claimant based on bodily injury, death or property damage. Further, although a restitution order is enforceable "*as if* the order were a civil judgment" (Pen. Code, § 1202.4, subd. (i), italics added), the use of the phrase "as if" in the Penal Code establishes that a restitution order does not, in fact, constitute a civil judgment. Thus, the restitution order is not a "judgment" enforceable against Mercury for purposes of Insurance Code section 11580, subdivision (b)(2).

a fact finder that Stockton and Valeski were insured. For this reason, as well, Mercury is not a proper party to a lawsuit against Stockton and Valeski. As a result, the trial court properly sustained Mercury's demurrer to these causes of action.

Finally, the third cause of action asserts a claim for negligent entrustment of motor vehicle. Although this does not appear to be a bad faith claim against Mercury, the trial court's sustaining of Mercury's demurrer with respect to this cause of action was appropriate because English cannot state such a cause of action against Mercury, given that he alleges that the owner of the vehicle at issue was Valeski, not Mercury.¹³

B. *To the extent that English may be attempting to challenge the court's order regarding Valeski, the order regarding Valeski is not appealable because there has been no appealable order or judgment entered with respect to her*

Although it is not entirely clear from English's briefing, it appears that he is seeking to reverse the trial court's order with respect to Valeski's demurrer, as well as the granting of her motion to strike certain portions of the first amended complaint.

"When a trial court's ruling on a demurrer leaves one or more causes of action pending or subject to amendment between two parties, that ruling is not appealable by those parties." (*Alfaro v. Community Housing Improvement System & Planning Assn., Inc.* (2009) 171 Cal.App.4th 1356, 1369 (*Alfaro*); *North American Chemical Co. v. Superior Court* (1997) 59 Cal.App.4th 764, 773 [where a trial court has sustained a

¹³ It appears from the allegations included in this claim that English intended to assert the third cause of action against Valeski, alone, but because he did not identify which causes of action were being asserted against which defendants, Mercury addressed this cause of action in its demurrer.

demurrer to less than all of several causes of action, the court's order is not directly appealable; petition for writ of mandamus is the appropriate way to seek review of trial court's action in such a circumstance].) In addition, "an order granting a motion to strike is not an appealable order." (*Walnut Producers of California v. Diamond Foods, Inc.* (2010) 187 Cal.App.4th 634, 641 (*Walnut Producers*).)¹⁴

It is clear that the trial court's rulings with respect to Valeski's demurrer left one or more causes of action subject to amendment. As a result, the trial court's rulings with respect to Valeski's demurrer are not cognizable on direct appeal from the trial court's order regarding her demurrer to the first amended complaint. Similarly, the trial court's granting of Valeski's motion to strike is not reviewable on direct appeal from the trial court's order, given that the order on the motion to strike is not appealable. If English wishes to have this court review the trial court's rulings with respect to Valeski's demurrer that are dispositive of certain causes of action and with respect to Valeski's motion to strike portions of the first amended complaint, he may properly challenge those rulings only from an appealable judgment entered with respect to Valeski.

¹⁴ In certain limited circumstances where the granting of the motion has the effect of fully determining the issues between the parties, the granting of a motion to strike portions of a pleading may be appealable. (See *Randle v. City and County of San Francisco* (1986) 186 Cal.App.3d 449, 454 ["orders denying leave to amend a complaint, denying substitution of parties, and granting motions to strike parts of a pleading, although ordinarily not appealable, are appealable where the orders 'have the effect of eliminating issues between a plaintiff and defendant so that nothing is left to be determined' "].)

C. *To the extent that English may be attempting to challenge the court's order regarding defendant Stockton, he may challenge the trial court's granting of Stockton's anti-SLAPP motion, but may not challenge the court's other rulings with respect to Stockton because the other rulings are not appealable*

To the extent that English seeks to challenge the trial court's rulings as to the sustaining of Stockton's demurrer to the first amended complaint and the granting of Stockton's motion to strike certain portions of the first amended complaint, we conclude that these rulings are not cognizable on direct appeal from the trial court's orders. It is clear that the trial court's rulings with respect to Stockton's demurrer left one or more causes of action asserted against Stockton subject to amendment. As a result, the trial court's rulings with respect to Stockton's demurrer are not cognizable on direct appeal. (See *Alfaro, supra*, 171 Cal.App.4th at p. 1369.) Similarly, the trial court's granting of Stockton's motion to strike various content from the first amended complaint is not reviewable on direct appeal from the trial court's order. (*Walnut Producers, supra*, 187 Cal.App.4th at p. 641.) If English wishes to have this court review the trial court's rulings with respect to Stockton's demurrer that are dispositive of certain causes of action and with respect to Stockton's motion to strike portions of the first amended complaint, he may properly challenge those rulings only from an appealable judgment entered with respect to Stockton.

However, English may challenge the trial court's order granting Stockton's anti-SLAPP motion on direct appeal: "An order granting or denying a special motion to strike shall be appealable under Section 904.1." (§ 425.16, subd. (i).) We therefore consider whether the trial court's ruling granting Stockton's anti-SLAPP motion with respect to the

first and fifth causes of action (for invasion of privacy and defamation, respectively), was correct, insofar as we can ascertain English's claims of error on appeal.

The same analysis that we applied in part III.A.1., *ante*, to Mercury's anti-SLAPP motion applies to Stockton's anti-SLAPP motion. Like Mercury, Stockton filed an anti-SLAPP motion as to the first and fifth causes of action and presented the same arguments in support of the motion. For the reasons that we explained with respect to Mercury's motion, Stockton has demonstrated that English's causes of action arise from protected activity. Stockton therefore shifted the burden to English to demonstrate a probability of prevailing on these causes of action with respect to Stockton. Just as we concluded that the trial court was correct in determining that English did not demonstrate a probability of prevailing on these claims as to Mercury, we also conclude that the trial court was correct in determining that English did not demonstrate a probability of prevailing on these claims as to Stockton: English's causes of action are based on statements made by an attorney in the course of a criminal judicial proceeding that fall within the protections granted pursuant to the litigation privilege (see Civ. Code, § 47, subd. (b)). We therefore affirm the dispositive order of the trial court granting defendant Stockton's anti-SLAPP motion as to English's first and fifth causes of action as to Stockton, thereby striking those causes of action from the pleading with respect to Stockton.

IV.

DISPOSITION

The judgment of the trial court as to defendant Mercury is affirmed. The order of the trial court granting defendant Stockton's anti-SLAPP motion is affirmed. To the

extent that English seeks review of the trial court's other rulings and orders with respect to defendants Stockton and Valeski, we decline to address them in this appeal because those rulings and orders are not appealable. Respondents are entitled to costs on appeal.

AARON, J.

WE CONCUR:

HUFFMAN, Acting P. J.

GUERRERO, J.